

ESTTA Tracking number: **ESTTA717833**Filing date: **12/31/2015**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	DEREGE LUCAS RAIS HOLDINGS LLC		
Entity	Limited Liability Company	Citizenship	BELIZE
Address	5716 Folsom Blvd #358 Sacramento, CA 95819 UNITED STATES		

Correspondence information	Lee Folkins Manager DEREGE LUCAS RAIS HOLDINGS LLC 5716 Folsom Blvd #358 Sacramento, CA 95819 UNITED STATES buylegalanabolics@anonymousspeech.com Phone:702-513-8252
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Applicant Information

Application No	86540197	Publication date	12/22/2015
Opposition Filing Date	12/31/2015	Opposition Period Ends	01/21/2016
Applicant	Designer Protein, LLC Suite 350 Carlsbad, CA 92008 UNITED STATES		

Goods/Services Affected by Opposition


Class 005. First Use: 2007/04/26 First Use In Commerce: 2007/04/26 All goods and services in the class are opposed, namely: Dietary supplements; Nutritional supplements in the nature of a nutrient-dense,protein-based drink mix; Nutritional supplements in the nature of shakes and energy bars; Dietary supplements in the nature of protein powders
Class 029. First Use: 2015/02/18 First Use In Commerce: 2015/02/18 All goods and services in the class are opposed, namely: Protein-based snack foods featuring nuts
Class 030. First Use: 2015/02/18 First Use In Commerce: 2015/02/18 All goods and services in the class are opposed, namely: Protein-based snack foods in the nature of granola bars

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Genericness	Trademark Act section 23
Other	Abandonment Section 15 U.S. Code Â§ 1127; Section 14 Section 1024; Trademark Act Section

	1a; Prima facie abandonment of Trademark Rights, including common law rights
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	4603551	Application Date	04/14/2014
Registration Date	09/09/2014	Foreign Priority Date	NONE
Word Mark	DESIGNERPROSTEROIDS.COM		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2011/07/01 First Use In Commerce: 2011/07/01 Dietary and nutritional supplements that promote the production and modulation of endogenous steroid hormones, peptide hormones, tropic hormones, proteins, amines, and nucleoside triphosphates in the human body, including testosterone, cortisol, estrogens, progestogens, dihydrotestosterone, dehydroepiandrosterone, dehydroepiandrosterone sulfate, androsterone, androstenediol, androstenedione, nandrolone, boldenone, boldione, GnRH, lutropin, SHBG, ACTH, insulin, growth hormone, IGF-1, glucagon, TRH, hCG, EPO, myostatin, and adenosine tri-phosphate		

Related Proceedings	Opposer has filed a Petition to Cancel Registrant's U.S. Registration No. 3380141; Opposer/Petitioner has filed Letter of Protest against Applicant's Serial No. 86540197; Applicant/Registrant has filed an Extension of Time to Oppose Opposer's/Petitioner's Application Serial No. 86625914
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Attachments	86251394#TMSN.png(bytes) Opposition_86540197.compressed.pdf(3495526 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Lee Folkins/
Name	Lee Folkins
Date	12/31/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 86/540,197
Published in the Official Gazette on December 22, 2015

Derege Lucas Rais Holdings, LLC)	
)	
Opposer,)	
)	Opposition No. _____
v.)	
)	
Designer Protein, LLC)	
)	
Applicant.)	

NOTICE OF OPPOSITION

The Opposer, Derege Lucas Rais Holdings, LLC (hereinafter "Opposer"), a Limited Liability Company of Belize, having a correspondence address of 5716 Folsom Blvd #358 Sacramento CA 95819, believes it will be damaged by the registration of the mark shown in the above-identified application, and hereby opposes the same.

As grounds for opposition, it is alleged that:

1. Upon information and belief, Designer Protein LLC (hereinafter "Applicant") is a Limited Liability Company of the State of Delaware located at 5050 AVENIDA ENCINAS SUITE 350 CARLSBAD, CALIFORNIA

UNITED STATES 92008, and is the owner of an application to register the "DESIGNER" mark, for use in connection with "Dietary supplements; Nutritional supplements in the nature of a nutrient-dense, protein-based drink mix; Nutritional supplements in the nature of shakes and energy bars" in International Class 005; and "Protein-based snack foods featuring nuts" in International Class 029; and "Protein-based snack foods in the nature of granola bars" in International Class 030. Said application was filed on February 19, 2015 under TEAS RF and subsequently amended on October 16, 2015 to Section 1(a) of the Trademark Act as relates to International Class 005, and Section 1(b) of the Trademark Act as relates to Class 029 and Class 030; and was assigned U.S. Application No. 86/540,197; and was published for Opposition in the Official Gazette on December 22, 2015.

2. Opposer is the owner of U.S. Registration No. 4,603,551 for "DESIGNERPROSTEROIDS.COM" for "Dietary and nutritional supplements..." in international class 005; U.S. Registration No. 4,486,580 for "LEGAL DESIGNER PROSTEROID" for "Dietary and nutritional supplements..." in international class 005; and U.S. Serial No. 86/625,914 for

“DESIGNERANABOLIX.COM”, an intent-to-use application for the Principal Register approved for publication in the Official Gazette on September 16, 2015 for “Dietary and nutritional supplements...” in international class 005.

3. As a result of Opposer’s nationwide promotion, advertising, and use of Opposer’s DESIGNERPROSTEROIDS.COM and LEGAL DESIGNER PROSTEROID marks in connection with its goods, the trade and consuming public now knows and recognizes Opposer’s DESIGNERPROSTEROIDS.COM and LEGAL DESIGNER PROSTEROID marks, and said trade and consuming public now also associates the marks with Opposer’s goods in class 005.

4. Opposer’s DESIGNERPROSTEROIDS.COM; DESIGNERANABOLIX.COM; and LEGAL DESIGNER PROSTEROID marks are the lawful and exclusive property of the Opposer. As a consequence of the high quality of Opposer’s industry-leading goods, and the substantial amount of goods sold and nationwide advertising of said goods, the above marks are now the foundation of Opposer’s valuable property and goodwill and are recognized and associated by the public as the symbols that distinguish Opposer’s industry-leading products in the marketplace as being of the highest quality.

5. Opposer is in direct competition with Applicant and offers goods for sale

that are similar and or identical to those identified in Application No. 86/540,197, namely dietary and nutritional supplements in international class 005.

6. Opposer has been using its “DESIGNERPROSTEROIDS.COM” mark, U.S. Registration No. 4,603,551 for “Dietary and nutritional supplements...” in international class 005; and its “LEGAL DESIGNER PROSTEROID” mark, U.S. Registration No. 4,486,580 for “Dietary and nutritional supplements...” in international class 005, and such use has been continuous, substantial, exclusive, and public since the respective dates of first use in commerce for the two marks at least as early as July 1, 2011 and September 1, 2012.

7. Applicant’s “DESIGNER” mark is confusingly similar to Opposer’s DESIGNERPROSTEROIDS.COM; DESIGNERANABOLIX.COM; and LEGAL DESIGNER PROSTEROID marks because:

- a.) Applicant’s mark is identical in appearance to the dominant portion of Opposer’s DESIGNERPROSTEROIDS.COM and DESIGNERANABOLIX.COM marks, and identical to the suffix portion of Opposer’s LEGAL

DESIGNER PROSTEROID mark*; (*See Section
2d Lanham Act)

b.) Applicant's mark is identical in sound to the
dominant portion of both of Opposer's
DESIGNERPROSTEROIDS.COM and
DESIGNERANABOLIX.COM marks; and identical
to the suffix portion of Opposer's LEGAL
DESIGNER PROSTEROID mark;

c.) Applicant's mark is substantially similar if not
identical in connotation to Opposer's
DESIGNERPROSTEROIDS.COM;
DESIGNERANABOLIX.COM and LEGAL
DESIGNER PROSTEROID marks;

d.) the goods of Opposer and the goods of the
Applicant are identical and marketed through the
same channels of trade and to the same general class

of consumers.

8. Applicant's mark is so much like Opposer's marks that it will likely cause confusion or deceive consumers that Opposer somehow endorses or sponsors Applicant's goods.

9. The continued use of the "DESIGNER" mark by Applicant in the United States marketplace will have a tremendously negative effect on the value of Opposer's DESIGNERPROSTEROIDS.COM; DESIGNERANABOLIX.COM and LEGAL DESIGNER PROSTEROID marks.

10. If this Opposition is not hereby sustained, any defect or fault in Applicant's goods, such as the defect currently being alleged against Applicant in a nationwide class action lawsuit in Federal Court for failing to meet product label claims by spiking products with cheap amino acids instead of actual protein in order to defraud the purchasing public, will necessarily reflect on and severely injure the valuable goodwill that Opposer has built for its goods in class 005 over the last four and one half years.

11. In the alternative, Opposer asserts that Applicant's DESIGNER mark Application No. 86/540,197 has been abandoned for failure to police. Since at least

as early as the alleged date of first use of April 26, 2007 for Applicant's Application No. 86/540,197 for the DESIGNER mark, numerous companies have been doing business, and are continuing to do business, including the marketing of a variety of dietary and nutritional supplement products, under trade names basically the same as, and/or incorporating Applicant's identical "DESIGNER" mark Application No. 86/540,197 into both the dominant and suffix portions of their own marks and those marks are currently in widespread use in commerce in the United States. Upon information and belief, Registrant has failed to take any and/or has taken entirely insufficient action to try to stop or prevent said conduct.

12. As a consequence of Applicant's blatant omissions and failure to police, Applicant's mark has lost any and all significance as an enforceable mark in the United States. Registrant's mark has thus been abandoned.

13. In the alternative, Opposer asserts that in direct support of Opposer's upcoming arguments regarding the prima facie abandonment of the DESIGNER mark Application No. 86/540,197, is the evidence of record for Applicant's previously registered identical "DESIGNER" mark, U.S. Reg. No. 3,380,141. Upon information and belief, Registrant has abandoned the trademark by discontinuing the use of the mark in commerce with no intent to resume such use.

Abandonment of the "DESIGNER" mark, U.S. Reg. No. 3,380,141 with no intent to resume use, is not even a fact in dispute and is clearly established in the uspto.gov's own public records showing Applicant's/Registrant's own and its various attorney's verbatim statements and admissions IN WRITING that use of the "DESIGNER" mark in commerce was discontinued sometime in January of 2012, and that as of March 2014 use in commerce still had not resumed, and Registrant's attorney's further stated that resumption of use in commerce would not even be until 2016, or now nearly 4 entire consecutive years after any *bona fide* use of or *bona fide* intent to use the DESIGNER mark in commerce already ceased.

14. Specifically, Bernard Kleinke, the previous attorney for DESIGNER PROTEIN LLC prior to being revoked as the attorney of record, states in his declaration of non-use for the DESIGNER mark, U.S. Reg. No. 3,380,141, on March 10, 2014:

"The owner has used the mark in commerce or in connection with the goods identified above, as evidenced by the attached specimen showing the mark as used on a container of nutritional supplements, powdered nutritional drink mix

supplements in Class 005, continuously for the time period after the date of registration until January of 2012. Current non-use of the mark is due to fact that the product shown in the attached specimen is no longer being sold, while owner is in the process of developing additional goods in Class 005 as identified above, that will be identified with the registered mark. Use of the mark is expected to resume in 2016. Current non-use of the mark is due to circumstances relating to product development, testing, and market research for goods in Class 005 as identified above, that will be identified with the registered mark, with the expectation that sales will begin in 2016. Current non-use is not due to an intention to abandon the mark.”

15. As the Board also knows, per Section 15 U.S. Code § 1127:

“A mark shall be deemed to be “abandoned” if either of the following occurs:

(1) When its use has been discontinued with intent not to resume such

use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. 'Use' of a mark means the *bona fide* use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark."

16. In addition, as the Board knows that per §1064 (Section 14 of the Lanham Act) regarding the Cancellation of registration:

"A petition to cancel* a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed as follows by any person who believes that he is or will be damaged...at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional, OR has been abandoned."

*See Opposer's additionally filed Petition to Cancel for the identical DESIGNER mark, U.S. Registration No. 3,380,141

17. Upon information and belief, Registrant abandoned its "DESIGNER" mark U.S. Registration No. 3,380,141 several years prior to the filing of said Petition to cancel that Registration and the filing of this Notice of Opposition and has no *bona*

fide intention of using said mark either now or in the future.

18. Opposer asserts that Applicant's DESIGNER mark Application No. 86/540,197, just like Registrant's U.S. Registration No. 3,380,141, has clearly also been abandoned due to 4 (four) entire consecutive years of non-use, ie. prima facie abandonment.

19. Attorney Janet Satterthwaite, ie. Designer Protein LLC's newly appointed attorney, submitted a purported "specimen of use" on October 16, 2015 in a transparent trademark "Squatter's" attempt to prove that the DESIGNER mark, Application No. 86/540,197, is in use in commerce in the United States. However, the purported specimen of use for the DESIGNER mark, Application No. 86/540,197, is actually merely a "specimen of use" only showing an entirely different mark, ie. the DESIGNER WHEY mark, U.S. Registration No. 3,111,771, supposedly in use in commerce in the United States, and specifically does not show the DESIGNER mark, Application No. 86/540,197, being used on its own at all.

20. In other words, the purported specimen of use submitted on October 16, 2015 was not for the DESIGNER mark Application No. 86/540,197 being in *bona fide* use in commerce, but rather the specimen was for an entirely different mark

owned by the same Applicant for DESIGNER WHEY, U.S. Registration No.

3,111,771.

21. As the Board already knows regarding the use of a mark in another form:

“Use of a mark as an essential part of a materially different composite mark does not excuse the failure to use the mark at issue. In re Continental Distilling Corp., 254 F.2d 139, 117 USPQ 300 (C.C.P.A. 1958) (decision showing that use of the composite mark ‘Yankee Clipper’ does not excuse the failure to use the individually registered marks ‘Yankee’ and ‘Clipper’.”

“U.S. Court of Customs and Patent Appeals

(1909-1982) - 254 F.2d 139 (C.C.P.A. 1958)

April 11, 1958

Leonard L. Kalish, Philadelphia, Pa., for
appellant.

Clarence W. Moore, Washington, D. C., for the
Commissioner of Patents.

Before JOHNSON, Chief Judge, and
O'CONNELL, WORLEY, RICH, and JACKSON
(retired), Judges. WORLEY, Judge.”

“These appeals involve the decisions of the
Assistant Commissioner, acting for the
Commissioner of Patents, refusing to accept
affidavits of use filed by appellant under the
provisions of section 8 of the Lanham Act
(Trademark Act of 1946) 15 U.S.C.A. § 1058, in
connection with Registrations Nos. 530,781 and
530,780, and ordering cancellation of said
registrations. The registrations are for the words
‘Yankee’ and ‘Clipper’ respectively, while the
specimens submitted with the affidavits show a
sailing vessel, surrounded by a circular border
bearing two stars and the words ‘Yankee Clipper

Blended Whisky.' The affidavits were refused on the ground the specimens did not show trademark use of either 'Yankee' or 'Clipper.'"

"This is the first case to come before us involving section 8 of the Lanham Act. That section provides that the Commissioner shall cancel any certificate of trademark registration on the principal register at the end of six years following its date unless there is filed, within one year next preceding such expiration, an affidavit 'showing that said mark is still in use or showing that its nonuse is due to special circumstances which excuse such nonuse and is not due to any intention to abandon the mark. The section further provides that the Commissioner shall notify the registrant who files such an affidavit of his acceptance or refusal thereof and, if the latter, the reasons

therefor.”

“The Assistant Commissioner, pointing out that a specimen identical with those here had been filed and accepted as showing continuing use of appellant's trademark ‘Yankee Clipper,’ for which registration No. 531,054 had been granted, held that such specimens did not show individual trademark use of ‘Yankee’ or ‘Clipper’ alone. We are in agreement with that holding.”

“It is evident that the words ‘Yankee’ and ‘Clipper’ are not used separately as trademarks on the specimens, but convey the single unitary meaning of an American ship of the clipper type. The illustration of such a ship forms a prominent feature of the specimen and, as above noted, appellant has registered ‘Yankee Clipper’ as a unitary trademark.”

“The instant situation is clearly distinguishable

from that in *In re Standard Underground Cable Co.*, 27 App.D.C. 320, relied on by appellant.”

“There the mark sought to be registered was the word ‘Eclipse’ which had been used on a label in conjunction with the words ‘Black Core’ and certain background material illustrating an eclipse. It was held the applicant had the right to select and designate what he considered the essential feature of the mark. It is to be noted that ‘Eclipse’ was a distinct and separable feature of the label. It did not modify another word and was not modified by other words, and it seems likely that the merchandise to which it was applied would have been asked for by the name ‘Eclipse.’ The decision is not authority for the proposition that one of two or more words which combine to give a unitary meaning may be arbitrarily selected as a

trademark.”

“On the other hand, the situation is closely similar to that in *Quaker City Flour Mills Co. v. Quaker Oats Co.*, 43 App.D.C. 260, in which an attempt was made to register ‘Quaker’ as a trademark on the basis of use of the words ‘Quaker City.’ In refusing registration the court pointed out that ‘Quaker’ alone had a meaning distinct from that of ‘Quaker City,’ and that the ‘mark as claimed’ (Quaker) had not been used. That case was expressly distinguished from the *Standard Underground Cable* case on that basis, the court pointing out that if the word ‘Quaker’ had merely been associated with separable or illustrative matter, such as a scroll or a picture of a man in Quaker dress, it could presumably have been registered alone. So in the instant case, the words ‘Yankee Clipper’ as a unit may have been used as

a trademark distinct from the words 'Blended Whisky' or the picture of a ship; but neither 'Yankee' nor 'Clipper' has been so used separately."

"Appellant contends that it is well settled that a registration affords prima facie evidence of continuing use of the registered mark and that, therefore, the Commissioner cannot question its use of the marks involved. However, section 8 of the Lanham Act clearly requires the filing of an affidavit 'showing that said mark is still in use,' and imposes upon the Commissioner the duty of deciding whether such an affidavit is sufficient and of cancelling the registration if it is not. It is evident those express requirements cannot be superseded by any presumption that the mark is in use."

“Appellant further contends that if its affidavits do not show trademark use of its registered marks they should be accepted as excusing its nonuse.

We are unable to see, however, how the fact that a word has been used as an essential part of a composite trademark excuses the failure to use it alone.”

“In our opinion, the specimens submitted by appellant disclose the use of ‘Yankee Clipper’ as an integral mark and do not show that either ‘Yankee’ or ‘Clipper’ alone has ever been used as a trademark. The Assistant Commissioner, therefore, properly refused to accept appellant's affidavits and ordered cancellation of the registrations involved in the instant appeals.

The decisions of the Assistant Commissioner are affirmed.”

22. Thus, based on the above-mentioned Court rulings, Opposer argues that in the instant case concerning the DESIGNER mark Application No. 86/540,197 and the DESIGNER mark Registration No. 3,380,141, that the circumstances surrounding non-use of the DESIGNER mark on its own, (ie. a complete and total lack of any *bona fide* actual use in commerce); combined with the failure to perfect the Section 8 affidavit for U.S. Registration No. 3,380,141 due to 4 (Four) entire consecutive years of non-use of the DESIGNER mark in commerce, along with the attorney Janet Satterthwaite's attempt at submitting the composite DESIGNER WHEY mark, U.S. Registration No. 3,111,771, to falsely try to claim that the individual DESIGNER mark is in use in commerce in class 005, plus the attorney Janet Satterthwaite's utter failure to prove any *bona fide* intent to use the mark with mere subjective and unsubstantiated statements of "intent to use" the DESIGNER mark in classes 029 and 030 on behalf of her client Designer Protein LLC (*See Boston Red Sox Baseball Club Ltd. v. Sherman*), dictate based on the totality of all the information presented in this Opposition that it is abundantly clear that the entire Application No. 86/540,197 for the DESIGNER mark for classes 005, 029, and 030 should be deemed void *ab initio* for abandonment, and that the DESIGNER mark U.S. Registration No. 3,380,141 be cancelled

forthwith.*

*See...Under Trademark Act Section 1(a), a registration will be held to be void ab initio, if the mark is not in use in commerce on or before the filing date of the trademark application; *ShutEmDown Sports v. Lacy*, 102 USPQ2d 1036 (TTAB 2012) (more than three years of nonuse, commencing with filing date for majority of the identified goods, and no evidence rebutting prima facie showing); Trademark Act § 45, 15 U.S.C. § 1127; See, e.g., *Linville v. Rivard*, 41 USPQ2d 1731 (TTAB 1996), *aff'd*, 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1998); *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990); *City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1676-79 (TTAB 2013) (abandonment of a registration under Trademark Act § 44(e), 15 U.S.C. § 1126(e), based on over three years of nonuse where respondent did not use mark with recited services since at least the issuance date of the involved registration and where the nature of the use shown by respondent did not constitute use in commerce); *Auburn Farms, Inc. v. McKee Foods Corp.*, 51 USPQ2d 1439 (TTAB 1998). Cf. *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179 (TTAB 2008) (plaintiff could not prove priority because it abandoned mark with no intent to resume use prior to use by defendant); *Otto International Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007) (plaintiff must allege ultimate facts pertaining to the alleged abandonment); See, e.g., *Lens.com Inc. v. 1-800 Contacts Inc.*, 686 F.3d 1376, 103 USPQ2d 1672, 1676-77 (Fed. Cir. 2012) (software that is merely a conduit through which online retail services are rendered is not “in use in commerce” in association with software); *International Mobile Machines Corp. v. International Telephone and Telegraph Corp.*, 800 F.2d 1118, 231 USPQ 142 (Fed. Cir. 1986); *Avakoff v. Southern Pacific Co.*, 765 F.2d 1097, 226 USPQ 435 (Fed. Cir. 1985); *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768, 1769 (TTAB 1994) (“use in commerce” involves the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark), *aff'd unpub'd*, 108 F.3d 1392 (Fed. Cir. 1997); *Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1929-30 (TTAB 2014) (claim of nonuse at time of filing for § 66(a) application legally insufficient for registration based on § 66(a) because time of nonuse begins from the date of registration); *Clorox Co. v. Salazar*, 108 USPQ2d 1083, 1086-87 (TTAB 2013) (applicant’s mark not in use in commerce as of the filing date of the use-based application); *Nutrasweet Co. v. K & S Foods Inc.*, 4 USPQ2d 1964 (TTAB 1987); *Pennwalt Corp. v. Sentry Chemical Co.*, 219 USPQ 542, 558 (TTAB 1983); *Bonaventure Associates v. Westin Hotel Co.*, 218 USPQ 537, 543 (TTAB 1983). *CarX Service Systems, Inc. v. Exxon Corp.*, 215 USPQ 345, 351 (TTAB 1982) (plaintiff must plead and prove that there was no use prior to filing date; mere claim that dates of use are incorrect does not state a claim of action).

Swatch AG (Swatch SA) (Swatch Ltd.) v. M.Z. Berger & Co., 108 USPQ2d 1463, 1471-77 (TTAB 2013) (documentary evidence, testimony and other record evidence do not support applicant’s claimed bona fide intent to use), *on appeal*, No. 14-1669 (Fed. Cir.); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1443 (TTAB 2012) (lack of a bona fide intent to use found where

there was no documentary evidence, affirmative statement that no documents exist, no industry experience, no development or business plan, vague allusions to using the mark through licensing or outsourcing, and applicant's demonstrated pattern of filing intent-to-use applications for disparate goods under the well-known and famous marks of others); *Spirits International B.V. v. S. S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birliigi*, 99 USPQ2d 1545, 1548-49 (TTAB 2011) (lack of a bona fide intent to use found where there was no documentary evidence, an affirmative statement that no such documents exist, and no other evidence to explain lack of documentary evidence); *SmithKline Beecham Corp. v. Omnisource DDS LLS*, 97 USPQ2d 1300, 1304-05 (TTAB 2010) (lack of a bona fide intent to use; no documentary evidence; record devoid of any other evidence of intended use); *Honda Motor Co. v. Friedrich Winkelmann*, 90 USPQ2d 1660 (TTAB 2009) (lack of bona fide intent to use); *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008) (lack of bona fide intent to use); *Lane Ltd. v. Jackson International Trading Co.*, 33 USPQ2d 1351, 1352 (TTAB 1994); *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1504 (TTAB 1993).

23. As the Board knows, the term "damage," as used in Sections 13 and 14 of the Act, 15 U.S.C. 1063 and 1064, relates only to a party's standing to file an opposition and/or a petition to cancel, respectively. A party may establish its standing to oppose or to petition to cancel by showing that it has a "real interest" in the case, that is, a personal interest in the outcome of the proceeding beyond that of the general public. There is no requirement that actual damage be pleaded and proved in order to establish standing or to prevail in an opposition or cancellation proceeding. See *Books on Tape Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301 (Fed. Cir. 1987); *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987), on remand, 5 USPQ2d 1622 (TTAB 1987), rev'd, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988); *International Order*

of Job's Daughters v. Lindeburg & Co., 727 F.2d 1087, 220 USPQ 1017 (Fed. Cir. 1984); Rosso & Mastracco, Inc. v. Giant Food Inc., 720 F.2d 1263, 219 USPQ 1050 (Fed. Cir. 1983); Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 217 USPQ 641 (Fed. Cir. 1983); Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); American Vitamin Products Inc. v. Dow Brands Inc., 22 USPQ2d 1313 (TTAB 1992); Estate of Biro v. Bic Corp., 18 USPQ2d 1382 (TTAB 1991); Hartwell Co. v. Shane, 17 USPQ2d 1569 (TTAB 1990); Ipcor Corp. v. Blessings Corp., 5 USPQ2d 1974 (TTAB 1988); Aruba v. Excelsior Inc., 5 USPQ2d 1685 (TTAB 1987); Bankamerica Corp. v. Invest America, 5 USPQ2d 1076 (TTAB 1987); BRT Holdings Inc. v. Homeway, Inc., 4 USPQ2d 1952 (TTAB 1987); American Speech-Language-Hearing Ass'n v. National Hearing Aid Society, 224 USPQ 798 (TTAB 1984); and Davco Inc. v. Chicago Rawhide Mfg. Co., 224 USPQ 245 (TTAB 1984).

24. However, based on the totality of all the information above, Opposer asserts that it has submitted clear, precise, convincing, and conclusive evidence (*including extensive facts of record IN WRITING in the uspto.gov's own public records that are not even in dispute and indeed cannot be disputed*),

that the Registration of Application No. 86/540,197 and the continued registration of Registration No. 3,380,141 for the "DESIGNER" mark for use on goods in International Class 005, or any other class, has and will continue to cause, severe and substantial injury and damage to Opposer/Petitioner.

25. As the Board knows, a plaintiff/opposer/petitioner need not allege and prove that the defendant acted in bad faith and intended to deceive the USPTO. The requirements for pleading and proving a lack of a *bona fide* intent to use a mark do not equate to the requirements for pleading and proving fraud. See *SmithKline Beecham Corp. v. Omnisource DDS LLS*, 97 USPQ2d 1300, 1305 (TTAB 2010).

WHEREFORE, Opposer respectfully requests that the Trademark Trial and Appeal Board deem Application No. 86/540,197 void *ab initio* for filing, in effect, a "use based" application on February 19, 2015 prior to actual *bona fide* use of the mark in commerce (*again, as is proven based on the evidence of record contained in U.S. Registration No. 3,380,141, and regardless of the fact that the purported actual "specimen of use" was not ultimately submitted under TEAS RF guidelines for the DESIGNER mark until October 16, 2015*); *prima facie*

abandonment due to 4 (four) entire consecutive years of non-use; prima facie
abandonment due to a lack of any *bona fide* use of the mark in commerce; and
prima facie abandonment due to a lack of any *bona fide* "intent to use" said mark
in commerce, forthwith.

Respectfully submitted,

Derege Lucas Rais Holdings, LLC

Signature: Lee Folkins

Name: Lee Folkins

Its: Manager

Date: 12-31-2015

CERTIFICATE OF SERVICE

This is to certify that on December 31, 2015, a true and correct copy of the foregoing document is being sent by regular first class mail, postage pre-paid, to the following address of record for the Applicant:

Designer Protein LLC

5050 AVENIDA ENCINAS SUITE 350 CARLSBAD, CALIFORNIA

UNITED STATES 92008

ADDRESS OF RECORD FOR APPLICANT

Derege Lucas Rais Holdings, LLC

Signature: _____

Name: Lee Folkins

Its: Manager

Date: _____

OPPOSER